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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 559

JAMES THOMSON, et al.,

Petitioners,

vs.

THOMAS CARMAN, et al.,

Respondents.

On Petition For A Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

BRIEF FOR RESPONDENTS ASSOCIATION OF MOTION PICTURE PRODUCERS, INC., ET AL., IN OPPOSITION

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This brief in opposition is submitted on behalf of Respondents Association of Motion Picture Producers, Inc., Charles Boren, Allied Artists Productions, Inc., Columbia Pictures Corporation, Screen Gems, Inc., Walt Disney Productions, Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Television, Inc., Warner Bros. Pictures, Inc., Alliance of Television Film Producers, Inc., Richard W. Jencks,

Jack Chertok Television, Inc., Desilu Productions, Inc., Filmaster, Inc., Four Star Television, Lassie Television, Inc., Jack Wrather Pictures, Inc., Mark VII Ltd., MCA Inc., Wyatt Earp Enterprises, Inc., Ziv-United Artists, Inc., and Bachelor Production Company, hereinafter referred to as "producer respondents".

Opinions Below

The oral opinion of the Superior Court of the County of Los Angeles, State of California (hereinafter referred to as "Superior Court") is set forth in appendix A to this brief and is not officially reported. The opinion of the District Court of Appeal of the State of California Second Appellate District, (hereinafter referred to as "District Court of Appeal") entitled James Thomson, et al., vs. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, etc., et al., is set forth in the appendix to the petition at pages 3-18 and is reported at 232 A.C.A. 539.

Jurisdiction

The judgment of the District Court of Appeal affirming the judgment of the Superior Court was entered on February 23, 1965, and a petition for rehearing was denied without opinion on March 16, 1965. A petition for hearing before the Supreme Court of California was denied without opinion on May 12, 1965.

The jurisdiction of this Court is sought to be invoked under Section 301 of the Labor-Management Relations Act of 1947, as amended (61 Stat. 156, 29 U.S.C. §185 (1964)).

Jurisdiction is challenged by this brief.

Questions Presented

1. Whether the findings of fact to the effect that the Memorandum Agreement of 1961 was not a final and binding collective bargaining agreement vesting petitioners with any rights, are clearly erroneous.

2. If such findings of fact are clearly erroneous, whether respondents acting in good faith and without hostility to petitioners could properly modify the terms of such collective bargaining agreement.

Statutes Involved

The pertinent portions of Sections 9(a) and 301 of the Labor Management Relations Act of 1947, as amended, (61 Stat. 143, 156, 29 U.S.C. §§ 159(a), 185 (1964)) are set forth in appendix B to this brief.

Statement

The petition fails throughout to present an accurate and complete description of the facts and events leading up to and underlying the dispute herein. For a complete and accurate statement of the facts herein, the Court is referred to the opinion of the District Court of Appeal (appendix to the petition, at pages 3-18), affirming the findings of fact of the Superior Court.

ARGUMENT

The Opinion of the District Court of Appeal Turns Upon an Analysis of Particular Facts Presenting no Important Question of Federal Law.

The petition is manifestly clear in asserting that petitioners' various causes of action all evolve from and are based exclusively upon respondents alleged breach of the so-called Memorandum Agreement of 1961, which petitioners contend was a final and binding collective bargaining agreement vesting them with certain rights. After a careful review of the evidence presented at the trial, the District Court of Appeal held that there was substantial evidence to support the Superior Court's findings of fact that the Memorandum Agreement of 1961 was not intended to be and was not in fact a final and binding collective bargaining agreement between the union and producer respondents and that therefore petitioners had acquired no vested rights whatever by such document.

As is made evident in the opening statement of the petition at pages 4 to 7, the asserted "federal question of substance" presented by petitioners *assumes* that the Memorandum Agreement of 1961 was in fact a final and binding collective bargaining agreement and that it was thereafter "changed" by respondents to the injury of petitioners. As shown by the fact that the great bulk of the petition is devoted to a recitation of petitioners' evidence on the factual issue of whether the Memorandum Agreement was a final and binding agreement, *even petitioners* recognize that their asserted "federal

question of substance" *cannot* appropriately be reached until and unless the Court were to *first* review all of the evidence presented at trial and conclude therefrom, contrary to the conclusion of the District Court of Appeal, that the findings of fact made by the Superior Court were clearly erroneous.

Viewed as such, the petition falls squarely within the many decisions of the Court, which have made it clear that certiorari will be denied where review is sought of a lower court opinion which turns solely upon an analysis of the particular facts involved or upon the construction of particular contracts. As stated in *United States v. Johnson,* 268 U.S. 220, 227 (1925), "we do not grant a certiorari to review evidence and discuss specific facts." Similarly, in *General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 178 (1938) the Court held that "granting of the writ (of certiorari) would not be warranted merely to review the evidence or inferences drawn from it." See also, *Aetna Life Ins. Co. v. Dunken,* 266 U.S. 389, 394 (1924); *Portland Railroad, Light and Power Company v. Railroad Comm'n. of Oregon,* 229 U.S. 397, 411-412 (1913).

The salutory principles announced in the above cited decisions of this Court would seem to require a refusal by this Court to accede to petitioners' request that it review the facts of this case.

In Any Event No Substantial Federal Question is Presented.

It is essential to the jurisdiction of this Court under 28 U.S.C. Section 1257 that a substantial federal ques-

tion be presented. A federal question is insubstantial where it is so foreclosed by prior decisions of the Court as to leave no room for controversy. See e.g. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1952); *Zucht v. King*, 260 U.S. 174, 176-177 (1922); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

If the Court were to grant certiorari, review the extensive record and thereafter conclude contrary to the District Court of Appeal that the findings of fact by the Superior Court were clearly erroneous, it would then be faced with the question of whether the union respondents, acting in good faith and without hostility, together with the producer respondents could properly modify the terms of the collective bargaining agreement.*

The opinion of the District Court of Appeal in regard to such question was that a collective bargaining agent has the clear right and power to modify an existing collective bargaining agreement, notwithstanding possible injury to certain of those employees that it represents, so long as in so doing the bargaining agent complies with the duty of fair representation owed by it to all members by acting in good faith and without an intent to hostilely discriminate against certain members. (opinion of the District Court of Appeal, appendix to the petition at pages 15-17)

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* Petitioners apparently do not seriously contend that the findings of fact of the Superior Court to the effect that the union respondents were acting in good faith and without hostility were clearly erroneous.

It is submitted that the opinion of the District Court of Appeal on this question is fully supported by the decisions of this Court in *Humphrey v. Moore,* 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953); *Aeronautical Industrial District Lodge v. Campbell,* 337 U.S. 521 (1949); *Steele v. Louisville & Nashville Railroad Co.,* 323 U.S. 192 (1944). These decisions stand for the proposition, *now settled beyond controversy* and clearly applicable to the instant case even as it is viewed by petitioners, that a union in the exercise of its statutory power may, in collective bargaining, enter into agreements, be they original agreements or modifications thereof, restricting the rights of all or a minority of the employees represented and resulting in what might in other areas of law be viewed as a deprivation of vested rights, so long as in so doing it does not breach its duty of fair representation by acting in bad faith or with hostility.*

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* Accord: *International Longshoremen's and Warehousemen's Union v. Kuntz,* 334 Fed.2d 165 (9th Cir. 1964); *Hardcastle v. Western Greyhound Lines,* 303 Fed.2d 182 (9th Cir. 1962), *cert. denied* 371 U.S. 920 (1962); *Potlatch Forests Inc. v. International Woodworkers of America,* 108 Fed.Supp. 906 (D. Ida. 1951), *aff'd sub nom. Olsen v. Potlatch Forests, Inc.,* 200 Fed.2d 700 (9th Cir. 1953); *Hartley v. Brotherhood of Ry. & S.S. Clerks,* 283 Mich. 201, 277 N.W. 885 (1938).

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Oral Opinion of the Superior Court*

LOS ANGELES, CALIFORNIA, WEDNESDAY, MAY 9, 1962, 1:40 P.M.

THE COURT: Both sides ready?

MR. SCHULLMAN: Yes, your Honor.

MR. LUDDY: Yes, your Honor.

THE COURT: I was going to make a few comments here, Mr. Luddy. Mr. Schullman, in his argument, stressed the point that the defendant unions and the majority of the local, as well as the Board of Directors of the local, were taking something away from the plaintiffs. Mr. Schullman made reference to the California Constitution and the Federal Constitution, cited a number of cases, and referred generally to other cases and said that that can't be done.

I should say further that that argument is based on the assumption that the memorandum agreement gave to these plaintiffs something that was later taken away.

It is my opinion in this case that the memorandum agreement was not a final and a binding agreement, and therefore that type of argument is not applicable under the facts here.

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* The oral remarks of the Superior Court made at the conclusion of argument, which we have interpreted to be the opinion of the court, are set forth in the reporter's transcript at pages 1508 to 1528. We have reproduced herein pages 1508 to 1514, line 9, which contain all relevant portions of the court's opinion, thereby omitting an extensive dialogue which followed between counsel and the court regarding proposed findings on subsidiary issues relating essentially to the capacity of the parties to sue and be sued.

Not only does the agreement in a concluding paragraph thereof indicate it is not a final agreement, but also it was expressly understood by all of the negotiators that no agreement was to be binding until approved by the respective Boards of Directors of the producers and the various unions involved.

That agreement never was ratified by those groups. The only agreement that was ratified was the basic agreement and the sound technicians' agreement of 1961. Therefore, it is my finding that the memorandum agreement of 1961 was not a final and binding agreement.

MR. SCHULLMAN: Your Honor, in view of that statement, may I suggest there is no purpose in further argument on either side. I have anticipated this, in all due deference to the Court. I think the Court is grossly in error, but that doesn't mean that I am right. I will be ready to accept your Honor's decision in this matter.

THE COURT: Well, I thought I might make a few comments here because I anticipate findings will be desired.

MR. SCHULLMAN: Yes, they will, your Honor.

THE COURT: And it might be helpful in the draftsmanship of the findings.

MR. SCHULLMAN: Yes. Well, your Honor, I'm going to be very candid, as I always am in every case, and with due respect to the Court, I think I have mentioned aliunde the courtroom that I loved to come in this courtroom always because I do enjoy being here before this Court. I do feel, as I do for my clients, that this Court

is grossly in error and will be in error with a miscarriage of justice. I am glad that your Honor did that because my first intention, as evinced to my clients, was to say this morning: If your Honor is of the firm opinion that the 10% as provided for in the memorandum agreement is not valid and subsisting, then it would obviate argument, because I don't like to argue in a vacuum. But I deferred doing it because I have a great respect for this Court, irrespective of this colloquy.

With that in mind — I hate to say this — and it doesn't make any difference — I mean, if the Court is correct, my anticipating of your decision doesn't change it. If the Court is wrong, my anticipation doesn't change it. I do feel the Court is in error, and I am not going to argue it or make a motion for new trial. I recognize I have anticipated, in all fairness, and told my clients four days ago that in my opinion the Court will so rule, honestly and conscientiously and as it sees fit. Under those circumstances, I think it would only be a waste of time to require additional argument either on the part of defendants or on my part, because I think that is your Honor's conviction and desire and opinion with respect to this case.

THE COURT: I thought you were through with your argument.

MR. SCHULLMAN: I am, your Honor, but I don't think it is necessary to sit here for four hours and listen to argument when the decision is pretty much determined by the Court.

THE COURT: I thought I would make comments with respect to my decision here, and I don't think there is any need for any argument from the defendants. I think that these comments will be helpful, however, in connection with findings, and that is what I have in mind, Mr. Schullman.

MR. SCHULLMAN: All right, your Honor.

THE COURT: The memorandum agreement, even if it be found to have been a binding and effective agreement, was rescinded by the express wording of the basic agreement of 1961, and Paragraph 11 thereof provides in part: "This agreement shall, as of its effective date, terminate and replace the memorandum agreement of 1961 between the parties hereto dated January 30, 1961."

Under the circumstances, that clearly shows that the parties themselves, even if that memorandum agreement had been the final agreement, those parties did rescind it, and all I can do is call your attention to Section 1559 of the Civil Code of California, which provides that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it. The parties here have rescinded the contract, so the plaintiffs — even if it be said that the contract was made expressly for their benefit, and I question that it was — the plaintiffs have no right to enforce this agreement.

First, as I say, the agreement was rescinded; second, I say that the plaintiffs have no right to enforce it, and incidental benefits conveyed by an agreement to a third

person don't give that third person any right of enforcement. It has to be for the express benefit of the plaintiffs, and so I find that the memorandum agreement was not a collective bargaining agreement enforceable by these plaintiffs.

Furthermore, I find that, and I will say this — the evidence in my opinion is overwhelmingly in support of the contentions of the defendants that there was no breach of the duty of fair representation in this particular case on the part of either the defendant local or the International Alliance or any of the agents or officers of those organizations.

I find that the evidence indicates they acted in good faith and without hostile discrimination to any of the plaintiffs or persons in the plaintiffs' class.

I can't help but quote from Ford Motor Company v. Hoffman, 345 U.S. 330, at page 338, where the United States Supreme Court said:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make it invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents subject to complete good faith and honesty of purpose in the exercise of its discretion. Compromises on a temporary basis with a view to long range advantages are natural incidents of negotiations."

At first blush it might be said that the wage scales set forth in the sound technicians' agreement of 1961 are discriminatory but the evidence, as I said, clearly indicates to the contrary. I think they were set up in good faith to eliminate inequities and these inequities were a cause of dissension in the union for some years and I think all members of the union recognized this problem and all the members had in mind that something had to be done sooner or later to eliminate those inequities.

It is my opinion the basic agreement of 1961 and the sound technicians' agreement of 1961 were fair and reasonable and that they are valid, binding, and subsisting contracts. I don't know that any additional comments are necessary.

APPENDIX B

Statutes Involved

Section 9(a) of the Labor Management Relations Act of 1947, as amended (61 Stat. 143, 29 U.S.C. § 159(a) (1964)), provides as follows:

> **"(a) Exclusive representatives; employees' adjustment of grievances directly with employer.**
>
> "Representatives designated or selected for the purposes of collective bargining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

Section 301 of the Labor Management Relations Act of 1947, as amended (61 Stat. 156, 29 U.S.C. § 185 (1964)), provides in pertinent part as follows:

> **"§ 185. Suits by and against labor organizations.**
>
> **"(a) Venue, amount, and citizenship.**

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

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Respondents International Sound Technicians, Local 695, referred to hereinafter and in the proceedings in the Court below as Defendant Local, International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada an international labor union with approximately 1,000 chartered locals, including Defendant Local, located in various communities in the United States and Canada, individual respondents who were officers or members of the negotiating committee and held other offices with Defendant Local, Thomas Carman, Business Representative of Defendant Local, Richard Walsh, Inter-